WONG CHIM YIAM v. BAR MALAYSIA

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(IM)(NCVC)-1842-09-2017]
14 NOVEMBER 2018

CIVIL PROCEDURE: *Committal proceedings – Appeal against – Committal proceedings initiated against solicitor for alleged contempt of court – Failure to comply with order of court – Allegation that solicitor aided and abetted client in disregarding court's order – Whether solicitor aware of committal proceedings initiated against him – Whether committal proceedings commenced within reasonable time – Whether charge against solicitor set out facts as to how he encouraged client to commit contempt of court – Rules of Court 2012, O. 52 rr. 3(2) & 4(3)*

CIVIL PROCEDURE: *Service – Service of process – Committal proceedings initiated against solicitor for alleged contempt of court – Whether solicitor aware of committal proceedings initiated against him – Whether committal cause papers properly served on solicitor – Whether personal service regularly effected – Rules of Court 2012, O. 52 rr. 3(2) & 4(3)*

The High Court made orders in suit 854 against one Lian Meng Wah ('LMW') that (i) he was a vexatious litigant; (ii) he needed to apply for leave from the court to initiate any suit against the plaintiffs; and (iii) he would be in contempt of court if he failed to comply. However, LMW filed a similar suit against the plaintiffs, the defendants in suit 297, for the same prayers in another suit, suit 560. The High Court struck out suit 297 without liberty to file afresh and made two further orders that (i) the plaintiff withdraws suit 560 on or before 26 June 2015; and (ii) if the plaintiff fails to withdraw suit 560 within the deadline, he is deemed to be in contempt of court ('suit 297 order'). Despite being present when the suit 297 order was made, LMW did not turn up on 26 June 2015 to withdraw suit 560. Instead, LMW applied for a restraining order against the defendants, restraining them from enforcing the orders. As LMW failed to withdraw suit 560, he was clearly in contempt of the suit 297 order. Committal proceedings were commenced against LMW and his solicitor ('the appellant') who both failed to turn up. At the High Court, the High Court Judge ('the HCJ') (i) considered and rejected the appellant's argument that he had no notice of the committal proceedings or of the cause papers; and (ii) found that the respondent had proved beyond reasonable doubt that the conduct of the appellant, by continuing to act for LMW in suit 560 despite having full knowledge of the suit 297 order, had aided and abetted LMW in contumaciously flouting the suit 297 order. Hence, the appellant appealed. The appellant submitted that (i) the committal cause papers were never served on the appellant. Instead, they were only

served on a clerk at the appellant's office and, as such, the mandatory requirement for personal service under O. 52 r. 4(3) of the Rules of Court 2012 Act ('ROC') was not complied with, making the service bad in law; (ii) the Suit 297 order required LMW to withdraw Suit 560 on or before 26 June 2015. However, the respondent only initiated committal proceedings against the appellant on 4 November 2016, a year and four months after the suit 297 order. The delay had prejudiced the appellant and the committal proceedings should have been dismissed; (iii) the respondent failed to state in what manner the appellant's conduct amounted to a contempt of court and there was no evidence produced by the respondent to show that the appellant had acted in aiding and abetting LMW to disobey the suit 297 order; and (iv) the charge against him was defective as the O. 52 r. 3(2) of the ROC statement ('the O. 52 statement') did not set out the facts fairly nor contained any particulars as to how the appellant encouraged or failed to prevent LMW from committing contempt of court in respect of the suit 297 order. Replying to the appellant's submissions, the respondent argued that (i) the committal papers were not served personally because they had a hard time serving the same on the appellant. As such, the respondent made an oral application for dispensation of service, pursuant to O. 52 r. 4 of the ROC, at the hearing of the committal application, and the HCJ found in favour of the respondent; (ii) the charge against the appellant clearly stated that the appellant should be committed for abetting and assisting LMW in wilfully and deliberately disregarding the suit 297 order; and (iii) the appellant was aware of the suit 297 order as the O. 52 statement had adequately set out the grounds on which the appellant's committal was sought and an affidavit verifying the facts relied on.

Held (allowing appeal with costs)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The cause papers were not served on the appellant. The application for dispensation of service was only made by the respondent at the hearing of the committal application, which ought to have been made prior to the hearing date to give the appellant due and proper notice of the proceedings. There was also nothing in the affidavit evidence or in the appeal record to indicate that the appellant was evading service of process. There was no such averment to that effect by the process server. As such, the respondent failed to establish that the appellant was evading service of process. Furthermore, according to the affidavit of service of the process server, he was only instructed to serve the committal papers on LMW and not on the appellant. The process server had gone to the appellant's law office for that purpose and did not inform the appellant's clerk that he wanted to serve the cause papers on the appellant. After leaving the cause papers with the clerk, the process server assumed that he had taken reasonable steps to serve the cause papers on the appellant and that service was proper. (paras 22 & 23)

(2) In the absence of any evidence showing that the appellant was evading service of process, the order for dispensation of service should not have been granted since the application for dispensation was made so late and in a committal proceeding. There was no reason proffered by the respondent for the inordinate delay in making the application for dispensation of service. The fact that the appellant had knowledge of the contempt proceedings made no difference. The requirement for personal service of the cause papers on the appellant was a mandatory requirement. This defect was fatal and, by itself, a sufficient ground to warrant appellate intervention in setting aside the HCJ's order. (paras 25 & 26)

(3) The question of whether the charge was defective turned on a construction of the notice of application, the O. 52 statement and the respondent's affidavit in support. The notice of application contained a prayer for the appellant to be committed for abetting and assisting LMW in wilfully and deliberately disregarding the suit 297 order. However, neither the O. 52 statement nor the affidavit in support filed by the respondent, contained any particulars as to how, when and in what manner the appellant aided and abetted LMW in disregarding the suit 297 order. Apart from stating that the appellant was acting for LMW at all material times, the allegations peppered throughout the affidavit in support were not specific and devoid of the necessary facts as against the appellant. In such circumstances, there was insufficient material to ensure that the appellant knew clearly what was alleged against him. As such, the appellant was not afforded every opportunity to answer the serious allegations levelled against him. (para 28)

Bahasa Malaysia *Headnotes*

Mahkamah Tinggi membuat perintah dalam guaman 854 terhadap seorang bernama Lian Meng Wah ('LMW') bahawa (i) dia seorang pelitigasi yang menyusahkan; (ii) dia perlu memohon kebenaran mahkamah untuk memulakan apa-apa guaman terhadap plaintif-plaintif; dan (iii) dia menghina mahkamah jika gagal mematuhinya. Walau bagaimanapun, LMW memfailkan guaman serupa terhadap plaintif-plaintif, iaitu defendan-defendan dalam guaman 297, untuk permohonan yang sama dalam satu lagi guaman iaitu guaman 560. Mahkamah Tinggi membatalkan guaman 297 tanpa kebebasan memfailkan guaman baharu dan membuat perintah lanjut bahawa (i) plaintif menarik balik guaman 560 pada atau sebelum 26 Jun 2015; dan (ii) jika plaintif gagal menarik balik guaman 560 dalam masa yang ditetapkan, dia dianggap menghina mahkamah ('perintah guaman 297'). Walaupun LMW hadir semasa Perintah Guaman 297 dibuat, dia tidak hadir pada 26 Jun 2015 untuk menarik balik guaman 560. Oleh kerana LMW gagal menarik balik guaman 560, dia jelas melakukan penghinaan bawah Perintah Guaman 297. Prosiding pengkomitan dimulakan terhadap

A LMW dan peguam caranya ('perayu') yang kedua-duanya gagal hadir. Di Mahkamah Tinggi, Hakim Mahkamah Tinggi ('HMT') (i) mempertimbangkan dan menolak hujahan perayu bahawa dia tidak menerima notis prosiding pengkomitan atau kertas-kertas kausa; dan (ii) memutuskan responden berjaya membuktikan, melampaui keraguan
B munasabah, bahawa tindakan perayu, yang berterusan bertindak bagi pihak LMW dalam guaman 560 walaupun dia tahu tentang perintah guaman 297, telah membantu dan bersubahat dengan LMW dalam berkeras melanggar perintah guaman 297. Maka perayu merayu. Perayu menghujahkan (i) kertas-kertas kausa pengkomitan tidak pernah disampaikan kepadanya. Sebaliknya,
C kertas-kertas kausa ini disampaikan kepada seorang kerani di pejabat perayu dan, dengan demikian, keperluan mandatori penyampaian kediri bawah A. 52 k. 4(3) Kaedah-kaedah Mahkamah 2012 ('KKM') tidak dipatuhi, menjadikan penyampaian tidak sah; (ii) perintah guaman 297 mengkehendaki LMW menarik balik guaman 560 pada atau sebelum 26 Jun 2015. Walau bagaimanapun, responden hanya memulakan prosiding pengkomitan
D terhadap perayu pada 4 November 2016, iaitu satu tahun empat bulan selepas perintah guaman 297 dikeluarkan. Kelewatan ini memprejudis perayu dan prosiding pengkomitan sepatutnya ditolak; (iii) responden gagal menyatakan bentuk tindakan perayu yang dikatakan membantu dan bersubahat dengan LMW untuk mengingkari perintah guaman 297; dan
E (iv) pertuduhan terhadap perayu cacat kerana pernyataan A. 52 k. 3(2) KKM ('pernyataan A. 52') tidak betul-betul mendedahkan fakta mahupun mengandungi apa-apa butir-butir tentang bagaimana perayu menggalakkan atau gagal menghalang LMW melakukan penghinaan mahkamah bawah perintah guaman 297. Membalas hujahan perayu, responden-responden
F menghujahkan (i) kertas-kertas kausa tidak disampaikan secara kediri kerana mereka menghadapi kesukaran menyampaikannya kepada perayu. Oleh itu, responden membuat permohonan lisan untuk pelaksanaan penyampaian, bawah A. 52 k. 4 KKM, semasa pendengaran permohonan pengkomitan, dan HMT memutuskan berpihak pada responden; (ii) pertuduhan terhadap
G perayu jelas menyatakan perayu harus dikomitkan kerana bersubahat dan membantu LMW agar sengaja mengabaikan Perintah Guaman 297; dan (iii) perayu sedar akan Perintah Guaman 297 kerana pernyataan A. 52 menyatakan alasan-alasan secukupnya penghinaan perayu yang dipohon serta afidavit yang mengesahkan fakta-fakta yang menjadi sandaran.

H **Diputuskan (membenarkan rayuan dengan kos)**
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Kertas-kertas kausa tidak disampaikan kepada perayu. Permohonan pelaksanaan penyampaian hanya dibuat oleh responden semasa
I pendengaran permohonan pengkomitan, yang sepatutnya dibuat sebelum tarikh pendengaran untuk memberi perayu notis prosiding yang wajar dan teratur. Tiada juga apa-apa dalam keterangan afidavit atau rekod rayuan untuk menunjukkan perayu mengelak penyampaian proses.

Tiada penegasan tentang ini oleh penghantar saman. Oleh itu, responden gagal membuktikan perayu mengelak penyampaian proses. Selanjutnya, menurut afidavit penyampaian penghantar saman, dia cuma diarah menyampaikan kertas-kertas pengkomitan kepada LMW dan bukan perayu. Penghantar saman pergi ke pejabat undang-undang perayu untuk tujuan ini dan tidak memaklumkan kerani bahawa dia ingin menyampaikan kertas-kertas kausa kepada perayu. Selepas meninggalkan kertas-kertas kausa dengan kerani tersebut, penghantar saman mengandaikan dia telah mengambil langkah-langkah munasabah dalam menyampaikan kertas-kertas kausa kepada perayu dan bahawa penyampaian teratur.

(2) Tanpa apa-apa keterangan yang menunjukkan perayu mengelak penyampaian proses, perintah pelaksanaan penyampaian tidak sepatutnya diberi kerana permohonan pelaksanaan dibuat terlalu lewat dan semasa prosiding pengkomitan. Tiada alasan yang dikemukakan oleh responden tentang kelewatan terlampau membuat permohonan pelaksanaan penyampaian. Fakta perayu tahu tentang prosiding pengkomitan tidak mendatangkan perbezaan. Keperluan penyampaian kertas-kertas kausa secara kediri, kepada perayu, adalah keperluan mandatori. Kecacatan ini menjejaskan dan, dengan sendirinya, satu alasan yang cukup untuk mewajarkan campur tangan rayuan untuk menolak perintah HMT.

(3) Soalan sama ada pertuduhan cacat merujuk pada pembentukan notis permohonan, pernyataan A. 52 dan afidavit sokongan responden. Notis permohonan mengandungi permohonan agar perayu dikomitkan kerana bersubahat dan membantu LMW, dengan sengaja, mengabaikan Perintah Guaman 297. Walau bagaimanapun, pernyataan A. 52 mahupun afidavit sokongan yang difailkan oleh responden tidak mengandungi apa-apa butir-butir tentang bagaimana, bila dan dalam bentuk apakah perayu membantu dan bersubahat dengan LMW dalam mengabaikan Perintah Guaman 297. Selain menyatakan perayu bertindak bagi pihak LMW pada setiap masa material, dakwaan-dakwaan yang ditabur dalam afidavit sokongan tidak khusus dan tiada fakta penting terhadap perayu. Dalam hal keadaan sedemikian, tidak cukup keterangan untuk memastikan perayu jelas tahu tentang dakwaan yang dibuat terhadapnya. Oleh itu, perayu tidak diberi peluang menjawab dakwaan-dakwaan serius yang dilemparkan terhadapnya.

Case(s) referred to:

Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 SC ***(refd)***

Perera v. The King [1951] AC 483 (PC) ***(refd)***

Re B (JA) (An Infant) [1965] CD 1112 ***(refd)***

Sivalingam S Ponniah & Ors v. Balakrishnan S Ponniah & Ors [2003] 6 CLJ 412 HC ***(refd)***

A *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC* ***(refd)***
Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang [2013] 1 CLJ 1060 CA ***(refd)***
Tay Siew Kiat v. Wan Leong Chai [2004] 7 CLJ 344 HC ***(refd)***
Taylor v. Roe [1893] WN 14 ***(refd)***
Tiger Powerhitz Sdn Bhd v. Guinness Anchor Marketing Sdn Bhd [2003] 5 CLJ 78 HC ***(refd)***
B *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1995] 3 MLJ 549* ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 13
Federal Constitution, art. 126
Rules of Court 2012, O. 1A, O. 2 rr. 1, 2, 3, O. 45 r. 7(2)(b), (3), O. 52 rr. 3(2),
C 4(3), (4)

For the appellant - Tan Kinv Tat & Low Peck Lim; M/s KC Yap & Partners
For the respondent - Asim Ng; M/s Fahri & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil No: 24NCVC-297-02-015
D *(overruled).]*

Reported by Najib Tamby

JUDGMENT

E **Vernon Ong Lam Kiat JCA:**

Introduction

[1] The appellant was at all material times practising as an advocate and solicitor. His appeal is against the decision of the High Court sitting in Kuala
F Lumpur which found him guilty of contempt of court and sentenced to three months' imprisonment.

[2] The background facts have been comprehensively set out in paras [4] to [14] of the High Court grounds of judgment and are reproduced below:

> 4. On 10.10.2014, S.M. Komathy J.C. in Kuala Lumpur High Court Civil
G Suit No. 24NCVC-854-06/2014 (the 854 Suit) made these orders against LMW:
>
> (i) That he is a vexatious litigant;
>
> (ii) That he needs to apply for leave from the court to initiate any suit against the Plaintiffs (D1-D6 in this Originating Summons); and
>
H
> (iii) That he will be in contempt of court if he failed to comply.
>
> 5. On 27.2.2015, LMW filed a similar suit against D1-D6 *vide* Kuala Lumpur High Court Civil Suit No. 24NCVC-297-02-2015 (the 297 Suit i.e. the present suit) for essentially the same prayers as in another suit, Kuala
I Lumpur High Court No. 24NCVC-560-04/2015 (the 560 Suit) which was filed on 15.4.2015.

6. On 25.5.2015, this court had struck out the 297 Suit without liberty to file afresh and made 2 further orders:

(i) That the Plaintiff withdraw the 560 Suit on/or before 26.6.2015; and

(ii) If the Plaintiff fails to withdraw the 560 Suit within that deadline, he is deemed to be in contempt of court.

(the 297 order)

7. LMW was present when the 297 order was made. However on 26.6.2015, he did not turn up in court nor did he withdraw the 560 Suit as ordered by this court.

8. On 18.8.2015, LMW applied for a Restraining Order *vide* Enclosure 25 in the 560 Suit against the Defendants from enforcing the Orders.

9. LMW remains a vexatious litigant as per the order S.M. Komathy JC.

10. By the virtue of the fact that LMW failed to withdraw the 560 Suit on or before 26.6.2015, he is clearly in contempt of court in respect of the 297 order.

11. On 12.1.2016, Noraini J, had dismissed LMW's 560 Suit (Enclosure 1) and also struck out LMW's application in Enclosures 25 and 28 therein.

12. On 13.1.2016, LMW filed yet another application (Enclosure 63) and served the sealed Notice of Application and the Affidavit in Support dated 13.1.2016 on the Defendants. Enclosure 63 was struck off on 15.4.2016.

13. The court records, as per the Notes of Proceedings, show that when these committal proceedings were commenced against LMW and WCY, both had failed to turn up despite being served and warrants of arrest were issued against them.

14. Till today, LMW remains at large as the warrant of arrest has yet to be executed whilst the warrant of arrest against WCY was executed on 23.1.2017." Page 5 of 14

Findings Of The High Court

[3] At the High Court, the learned judge considered and rejected the appellant's argument that he had no notice of the committal proceedings or of the cause papers. The learned judge found that the appellant was aware at all times of the committal proceedings and had studiously avoided being served personally with the cause papers which were finally served on his firm and received by his legal clerk who was ordered to be cross-examined on her two affidavits filed. The learned judge concluded that the appellant had constructive notice if not actual notice of the committal proceedings.

[4] The learned judge also rejected the appellant's argument that the nature of the offence had not been particularised in the cause papers as the facts as set out in the cause papers are sufficient and adequate for the appellant to understand the nature of the offence alleged against him and he was not prejudiced in any way.

[5] The learned judge accordingly found that the Malaysian Bar (the respondent in this appeal) had proved beyond reasonable doubt that the conduct of the appellant, by continuing to act for LMW in the 560 suit despite having full knowledge of the 297 order had aided and abetted LMW in contumaciously flouting the 297 order. This was done with the intention to interfere with the proper administration of justice and constitutes contempt of court.

Submission Of Parties

[6] In his oral submission before us, learned counsel for the appellant sought to attack the learned judge's decision on the following grounds: (i) that the charge against the appellant was defective, (ii) that there was undue delay in filing the contempt proceedings (iii) that service of the committal papers is bad, and (iv) that the charge against the appellant was not proved beyond reasonable doubt.

[7] On the first point, it was argued that para. (6) of the O. 52 r. 3(2) statement did not set out the facts fairly or contain any particulars as to how the appellant encouraged or failed to prevent LMW from committing contempt of court in respect of the 297 order (*Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 1 CLJ 1060 (CA)). The 297 order only required LMW to withdraw his suit against the respondent in another High Court and it did not involve the appellant (*Tay Siew Kiat v. Wan Leong Chai* [2004] 7 CLJ 344; [2004] 3 MLJ 49). Further, the penal notice endorsed on the copy of the 297 order only gave notice to LMW informing LMW of the consequences if LMW neglects to obey the 297 order. No penal notice whatsoever was given to the appellant.

[8] Secondly, learned counsel argued that the 297 order required LMW to withdraw the 560 suit on or before 26 June 2015. However, the respondent only initiated committal proceedings against the appellant a third party on 4 November 2016, one year and four months after the 297 order. There was no explanation for the delay by the respondent. As such, the delay has prejudiced the appellant and the committal proceedings should have been dismissed (*Tiger Powerhitz Sdn Bhd v. Guinness Anchor Marketing Sdn Bhd* [2003] 5 CLJ 78; [2003] 1 MLJ 314).

[9] The third point relates to service. Learned counsel for the appellant argued that it is not disputed that the committal cause papers were never served personally on the appellant; instead, they were only served on a clerk at the appellant's office. As such, the mandatory requirement for personal service under O. 52 r. 4(3) was not complied with and service was therefore bad in law and the committal proceedings should have been dismissed (*Tiger Powerhitz (supra)*; *Sivalingam S Ponniah & Ors v. Balakrishnan S Ponniah & Ors* [2003] 6 CLJ 412).

[10] Lastly, it was argued that the respondent failed to state in what manner the appellant's conduct amounted to a contempt of court and there was no evidence produced by the respondent to show that the appellant had acted in aiding and abetting LMW to disobey the 297 order. The respondent's assertion that the appellant was the solicitors for LMW is a bare assertion without any evidential basis. On the evidence before the court, the respondent had failed to prove the charge against the appellant beyond reasonable doubt.

[11] In reply, learned counsel for the respondent conceded that the committal papers were not served personally on the appellant because they had a hard time serving the cause papers on the appellant. As such, the respondent had made an oral application for dispensation of service pursuant to O. 52 r. 4 of the ROC 2012 at the hearing of the committal application. It was also argued that the learned judge was justified in finding that the appellant was evading service of process even though there was no affidavit evidence on the appellant evading service of process. Learned counsel also argued that the charge against the appellant clearly stated that the appellant should be committed for abetting and assisting LMW in wilfully and deliberately disregarding the 297 order. Further, the O. 52 statement had adequately set out the grounds on which the appellant's committal is sought and an affidavit verifying the facts relied on. The appellant was at all material times well aware of the 297 order.

Contempt Of Court

[12] Contempt of court has been defined by the Federal Court as any conduct that tends to bring the authority and administration of the law into disrespect or disregard or to interfere with or prejudice parties, litigants, or their witnesses during the litigation (*Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 FC).

[13] Contempt of court may be constituted by acts of omissions and commissions, such as failure to obey a judgment or order of the court to scandalising the court itself. To constitute contempt of court, there must be involved some act or writing published calculated to bring a court or judge of the court into contempt or to lower his authority or something calculated to obstruct or interfere with the due course of justice or the lawful process of the courts (*Perera v. The King* [1951] AC 483 (PC)).

[14] The court has power to punish any contempt of itself (art. 126 of the Federal Constitution; s. 13 of the Courts of Judicature Act 1964). A contempt of court is punishable because of the necessity of maintaining the dignity and respect towards the court. The power to punish for a contempt is exercised to vindicate the court's dignity (see *Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 at p. 61 (SC)).

[15] Contempt of court may be classified into two categories. The first category relates to specific conduct for contempt for breach of a particular court order. The second category is wider in scope as it relates to a more general conduct for interfering with the due administration or the course of justice (*Tan Sri Dato' (Dr) Rozali Ismail (supra)*).

Burden And Standard Of Proof

[16] As in any application, the burden of proof is on the applicant to produce evidence in support of the charge of contempt as set out in the statement filed by the applicants.

[17] In this instance, the contempt proceedings were initiated in a civil action. Be that as it may, the contempt proceedings are *quasi*-criminal in nature because it involves the liberty of the alleged contemnor; if found guilty of contempt, the contemnor may be subject to a fine or a term of imprisonment. Accordingly, the charge of contempt must be proved beyond reasonable doubt (*Tan Sri Dato' (Dr) Rozali Ismail (supra); Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 1 CLJ 1060 CA). And where there is doubt, such doubt ought to be resolved in favour of the alleged contemnor (*Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1995] 3 MLJ 549 (SC)).

Contempt Proceedings

[18] Given that contempt proceedings involve the liberty of an individual, committal is a very serious matter. As such, the court must proceed very carefully before making an order to commit to prison. In this light, rules have been promulgated to ensure that the alleged contemnor knows clearly what is being alleged against him and is accorded every opportunity to meet the allegations. For instance, it is expressly provided that an order requiring a person to do an act shall not be enforced unless the order was served personally on the person before the expiration of the time within which he was required to do the act (O. 45 r. 7(2)(b)). Similarly, a body corporate is also required to be served with the order under sub-r. (3).

[19] In the event that safeguards such as these have not been observed in any particular case, then the process is defective even if no particular harm may have been done. For instance, if the notice of application for an order of committal together with a copy of the statement under O. 52 r. 3(2) has not been served personally on the alleged contemnor, the fact that the alleged contemnor knows all about it, and indeed attends the hearing of the proceedings, makes no difference (*Re B (JA) (An Infant)* [1965] CD 1112). Similarly, if the notice of application does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of application, that is a fatal defect, even though the alleged contemnor gets to know everything before the notice of application comes on, and indeed answers the affidavits (*Taylor v. Roe* [1893] WN 14).

[20] There is, however, a distinction in principle between cases where there has been non-observance of some safeguard laid down in the interests of the alleged contemnor, and a mere technical irregularity. In instances where the court is called upon to consider mere verbal deficiencies in the documents in question; cases where documents do not comply strictly with the rules, but where it is impossible that in any conceivable case the alleged contemnor could be in any way prejudiced by the defects, then there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would in any other proceeding (see O. 1A & O. 2 rr. 1, 2 and 3 of the ROC 2012).

Our Decision

[21] After carefully considering the submissions of learned counsel for the parties and on a scrutiny of the appeal record and the grounds of judgment of the learned judge, we are constrained to set aside the order of the learned judge. We did so for the following reasons.

No Service

[22] In the first instance, the cause papers were not served on the appellant. The application for dispensation of service was only made by the respondent at the hearing of the committal application. In our view, it ought to have been made prior to the hearing date. If it had been made prior to the hearing of the application, then the cause papers could have been served by way of substituted service on the appellant so as to give the appellant due and proper notice of the proceedings. Further, there is nothing in the affidavit evidence or in the appeal record to indicate that the appellant was evading service of process. There is no such averment to that effect by the process server. As such the respondent has failed to establish that the appellant was evading service of process.

[23] We also note that according to the affidavit of service of the process server, he was only instructed to serve the committal papers on LMW (the plaintiff) and not on the appellant (see para. 2 of the affidavit of service). He had gone to the appellant's law office for that purpose. He did not inform the clerk at the appellant's law office that he wanted to serve the cause papers on the appellant. He did not even ask for the appellant. Instead, he left the cause papers with the clerk. He did not ask the clerk to hand over the cause papers to the appellant. He then assumed that he had taken reasonable steps to serve the cause papers on the appellant and that service was proper (see para. 4 of the affidavit of service).

[24] In her grounds of judgment the learned judge made a finding that the appellant was at all material times aware of the committal proceedings and had "… studiously avoided being served personally with the cause papers which were finally served on his firm and received by his legal clerk …".

The learned judge also discounted the clerk's explanation that she placed the cause papers on her table for LMW's collection and that she did not give the cause papers to the appellant. As such, the learned judge found that the appellant had constructive notice if not actual notice of the committal proceedings.

[25] In the first instance, there were no grounds warranting the granting of dispensation of service under O. 52 r. 4(4) of the ROC. We reiterate that application for dispensation of service ought to have been made prior to hearing date and not on the hearing date itself. In the absence of any evidence showing that the appellant was evading service of process, the order for dispensation of service should not have been granted especially since the application for dispensation was made so late and in a committal proceeding. We also do not see any reason being proffered by the respondent for the inordinate delay in making the application for dispensation of service.

[26] The fact that the appellant had knowledge of the contempt proceedings makes no difference. The requirement for personal service of the cause papers on the appellant is a mandatory requirement. In our view, this defect is fatal and by itself is a sufficient ground to warrant appellate intervention in setting aside the learned judge's order.

Defective Charge

[27] The learned judge accepted that the main thrust of the complaint in the affidavit in support was levelled against LMW. However, the learned judge found that from the cause papers and the fact that the appellant had represented LMW in the various proceedings in different courts, the appellant cannot now deny his involvement in the matter. The learned judge also found that even if the respondent had not strictly complied with O. 52, regard should be had to justice and not only to technical non-compliance with the rules pursuant to O. 1A of the ROC 2012.

[28] In our view, the question of whether the charge is defective turns on a construction of the notice of application, the O. 52 statement and the respondent's affidavit in support. The notice of application contains a prayer for the appellant to be committed for abetting and assisting LMW in wilfully and deliberately disregarding the 297 order. However, neither the O. 52 statement nor the affidavit in support filed by the respondent contained any particulars as to how, when and in what manner the appellant aided and abetted LMW in disregarding the 297 order. In the O. 52 statement, the only reference to the appellant by way of further relief is found in para. 6. Apart from stating that the appellant was acting for LMW at all material times, the allegations peppered throughout the affidavit in support are not specific and devoid of the necessary facts as against the appellant. In such circumstance,

we do not think that there is sufficient material to ensure that the appellant knows clearly what is alleged against him; as such that the appellant was not afforded every opportunity to answer the serious allegations levelled against him.

Conclusion

[29] For the foregoing reasons, we are of the view that the safeguards entrenched in the rules in committal proceedings have not been observed. Accordingly, we find that the process defective and that appellate intervention is warranted. Accordingly, we set aside the order of the High Court and allowed the appeal with costs of RM5,000 subject to payment of allocator.